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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)
)
QUALCOMM INCORPORATED)
)
Petition for Declaratory Ruling)
Giving Effect to the Mandate of the)
District of Columbia Circuit Court)
Of Appeals)
)
Service Rules for the 746-764 and)
776-794 MHz Bands, and Revisions)
to Part 27 of the Commission's Rules)

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FEDERAL COMMUNICATIONS COMMISSION
Office of the Secretary
DA 00-219

WT Docket No. 99-168

Comments

Rig Telephones Inc. dba Datacom ("Datacom) by its attorneys, hereby files these Comments in response to the Petition For Declaratory Ruling filed by Qualcomm Incorporated ("Qualcomm") in the above-captioned proceeding.¹ Qualcomm seeks to be awarded the 700 MHz band D Block license (752-762 MHz and 782-792 MHz) in the Southeast Economic Area Grouping 3 ("EAG 3"). For the reasons set forth below, Datacom opposes this request.

Datacom is a provider of domestic and international communications services both on-shore and off-shore. Datacom specializes in providing communications services in the Gulf of Mexico, where it serves off-shore rigs and platforms. These services are essential to drilling operations in the Gulf. Currently, Datacom is operating

¹ "Wireless Telecommunications Bureau Seeks Comments On Qualcomm Incorporated's Petition For Declaratory Ruling Seeking 700 MHz Band License Pursuant To Ruling Of U.S. Circuit Court of Appeals." *Public Notice*, DA 00-219, released February 4, 2000.

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communications services in the 6 GHz band, the South Louisiana Offshore Zone frequencies, and UHF frequencies. Services include a wide range of voice, data and Supervisory Control and Data Acquisition Systems ("SCADA"). The off-shore drilling industry has come to rely heavily on data and SCADA services and many platforms could not function today without them.

Qualcomm seeks to withdraw its pending pioneer's preference request for the A Block broadband PCS license in the Southern Florida Major Trading Area and substitute for it the Block D EAG3 license in the 700 MHz band. Qualcomm makes this request pursuant to a recent D.C. Court of Appeals decision directing the Commission to award Qualcomm "suitable spectrum" similar to what it would have had under the earlier pioneer's preference. *Qualcomm v. FCC*, 181 F.3d 1370 (D.C. Cir. 1999).

The Commission should not grant Qualcomm's request for both legal and policy reasons: First, granting the request would violate the Communications Act; second, it would give Qualcomm a huge "windfall" to which it is not entitled, i.e., a much more valuable license than what it originally sought; and third, EAG3 includes a large portion of the Gulf of Mexico, which is not "suitable spectrum" to replace the Southern Florida MTA.

Qualcomm's request asks the Commission to ignore the requirements of §337(b)(2) of the Communications Act of 1934, as amended, 47 USC §337(b)(2), which *requires* the Commission to allocate the frequencies Qualcomm seeks through "competitive bidding." The provisions of §337(b)(2) are not optional; the Commission is not at liberty to award *some* of the spectrum at issue through competitive bidding and other parts through some other process, however worthy the cause. Whether or not

Qualcomm was “wronged” by the Commission in the past, the Commission cannot in crafting a remedy ignore the plain requirements of the Communications Act that the spectrum *must* be assigned through *competitive bidding*. Nor did the D.C. Circuit’s order allow the Commission to ignore this requirement. The fact that Qualcomm would pay for the spectrum does not change this: payment is not the same as competitive bidding.

The earlier pioneer’s preference was for the Miami/Fort Lauderdale MTA. The EAG 3, however, covers a vast geographical area in the Southeast United States that includes not only the entire State of Florida and several other nearby States, but also a large part of the Gulf of Mexico. Although EAG3 covers a geographical area and population that is significantly larger than the Southern Florida MTA, Qualcomm nonetheless believes it is “suitable spectrum” to replace what it would have received under its original pioneer’s preference.

Qualcomm’s petition is based primarily on a monetary value argument. Qualcomm argues that the *present* value of what it would have had under its pioneer’s preference is equal to the value of the entire EAG3 Block D license, and Qualcomm presents a study by an accounting firm to support its valuation comparison. Qualcomm argues further that it lost profits and market opportunity as a direct result of not receiving the earlier pioneer’s preference because it was prevented from being “first to the market” with its new technology. Thus, Qualcomm believes that now the Commission must make up for these losses Qualcomm suffered by letting it have the Block D EAG3 license so that it can be first to market with its “exciting and innovative” next generation technology. Using this monetary value argument, Qualcomm seeks to expand what they would have had under the original pioneer’s preference into a much larger “piece of the

pie.” Thus, they would interpret the court’s award of “suitable spectrum” as an award of compensatory legal damages.

However, the D.C. Circuit did not award such damages to Qualcomm, but rather issued a decision under the Administrative Procedures Act finding that the Commission had misapplied its Rules in denying Qualcomm’s pioneer’s preference. The sole remedy ordered was a remand to the Commission to grant spectrum to Qualcomm. The Court did not order the Commission to make Qualcomm whole in a monetary or lost value sense. Nor has Qualcomm pointed to any authority that would allow it to claim such compensatory damages from the Commission or the United States Government for what it suffered. The Court’s order gives no guidance on what would be “suitable.”

Qualcomm is not the first FCC license applicant ever to win an appeal of a Commission order denying a license application, thus obtaining, perhaps years later, an order requiring the Commission to grant the application. Yet Qualcomm has pointed to no authority for the notion that a prevailing applicant under such circumstances is entitled to legal compensatory damages or value compensation to make up for lost time, market opportunity, or business growth. This is because none exists. Neither the APA, nor the Communications Act, nor the Federal Tort Claims Act allows any such award.

The fact that Qualcomm would pay for the license if the Commission grants its petition makes no difference to this analysis. What matters is the fact of receiving a much larger preference, i.e., a bigger “piece of the pie” than what they initially would have received, without having to go through competitive bidding. Their proposal is in the nature of compensatory damages, and the Court’s order does not require that on its face. Granting Qualcomm’s request would create a precedent that any license applicant who is

held up by the Commission in receipt of its license could then be entitled to a larger license area.

This still leaves the question of what is “suitable spectrum” for Qualcomm. Qualcomm. The logical answer is that the Court intended Qualcomm to receive something equivalent to Southern Florida in terms of geographical size and population coverage to what it would have had. But no matter what or where that might be, whether an MTA around Atlanta, or Chicago, or even Miami itself, it clearly is not the Gulf of Mexico. Simply put, spectrum in the Gulf of Mexico is in no way a “suitable” alternative to the Southern Florida MTA. The reasons are obvious. The customer base and the technical problems are different in the Gulf than in Southern Florida. Moreover, whether or not Qualcomm’s latest new technology will prove useful in the Gulf of Mexico, we doubt that the Gulf would be a convenient location for Qualcomm to showcase its technology.

Conclusion

In view of the foregoing, Datacom respectfully requests that the Commission take action in accordance with the views expressed herein.

Respectfully submitted,

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Date: February 18, 2000

CERTIFICATE OF SERVICE

I certify that on this 18th day of February, 2000, I served the foregoing Comments on the below-named individuals at the addresses indicated by causing the same to be deposited in the U.S. Mail, first-class postage prepaid:

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A handwritten signature in black ink, appearing to read "Matthew DeLuca", written over a horizontal line.